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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1231

LINDEN LUMBER DIVISION, SUMMER & CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

No. 73-1234

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRUCK DRIVERS UNION LOCAL NO. 413, AND
TEXTILE WORKERS UNION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 23-50)[1] is reported at 487 F. 2d 1099. The Board's

[1] The opinion covers two cases consolidated in the court of appeals—*Truck Drivers Union Local 413, International Brotherhood of Teamsters, etc.* v. *National Labor Relations Board*, No. 71-1529 (hereafter *Linden*), and *Textile Workers*

decision in *Linden* (Pet. App. C, pp. 54–118) is reported at 190 NLRB 718. The Board's initial decision in *Wilder* (Pet. App. D, pp. 119–159) is reported at 173 NLRB 214, and the decision of the court of appeals remanding for reconsideration (Pet. App. E, pp. 160–164) is reported at 420 F. 2d 635. The Board's two supplemental decisions in *Wilder* (Pet. Apps. F and G, pp. 165–193) are reported at 185 NLRB 175 and 198 NLRB No. 123.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, pp. 51–53) was entered on September 13, 1973, and was amended on November 6, 1973. On December 6, 1973, and December 20, 1973, the Chief Justice extended the time of the Board and Linden, respectively, for filing petitions for writs of certiorari to and including Sunday, February 10, 1974. The petitions were filed on February 11, 1974, and were granted on April 22, 1974 (A. 53–54). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Sections 8(a), 9(a) and (c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 158(a), 159(a) and (c)) provide in relevant part as follows:

Union of America v. *National Labor Relations Board*, No. 72–1794 (hereafter *Wilder*).

"Pet. App." refers to the appendix to the petition for certiorari in *National Labor Relations Board* v. *Truck Drivers Union Local No. 413, and Textile Workers Union*, No. 73–1234, "A." refers to the separate appendix to the briefs.

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their

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employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

QUESTION PRESENTED

Whether an employer violates his bargaining obligation under the National Labor Relations Act by declining to accept a union's authorization card or picket line indication of employee support and insisting that the union establish its representative status in a Board election, when the employer has not engaged in conduct that would preclude the holding of a fair election and has not agreed to a voluntary method of determining the union's majority status.

STATEMENT

A. THE BOARD'S DECISIONS

1. LINDEN

At an organizational meeting in December 1966, Norman, an agent of Local No. 413 of the Teamsters Union ("the Union"), obtained from twelve employees of Linden Lumber Division of Summer & Co. ("Linden") [2] signed cards authorizing the Union to represent them for collective bargaining (Pet. App. C, pp. 78–79; A. 8–12, 44).[3] On January 3, 1967, the Union wrote to Linden requesting recognition and stating that a majority of its "truck drivers, warehousemen, production workers, maintenance men and yard men" had designated the Union as their collective bargaining representative (Pet. App. C, p. 79; A. 12–13, 45). On January 6, Linden denied the request for recognition, expressing doubt about the Union's majority status and suggesting that "the proper way to determine such questions" would be for the Union to petition for a Board election (Pet. App. C, p. 79; A. 13, 47). Meanwhile, on January 5, the Union had filed with the Board's Regional Office a petition for a representation election (Pet. App. C, p. 79; A. 13, 46).

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[2] Linden manufactures prefabricated homes and sells lumber products (Pet. App. C, p. 78).

[3] Included were the cards of two employees, Marsh and Shafer, who the Company alleged were supervisors (Pet. App. C, p. 79; A. 3–5, 11–12). Excluding Marsh and Shafer, there were ten employees in the appropriate bargaining unit which the Union sought to represent (Pet. App. C, p. 84).

On February 3, a Board hearing officer held a prehearing conference on the Union's representation petition. During the meeting, the Union's attorney, Smedstad, asked the Company's consultant, Rector, about the possibility of entering into a consent election agreement. Rector said that he would not enter into such an agreement because Local 413 had been organized by supervisors (Marsh and Shafer, see p. 5, *supra*, n. 3), and it would be unlawful for Linden "to recognize any union that had been organized by supervisors" (Pet. App. C, p. 56; A. 33–36). The hearing officer noted that Linden's claim of supervisory influence in the organization of Local 413 related to the Union's showing of interest required to obtain a Board election and could not be litigated at a representation hearing (Pet. App. C, p. 56; A. 36).[4]

When Rector maintained his position, the Union withdrew the representation petition (Pet. App. C, p. 56; A. 37). Thereafter, Rector told Smedstad that, if the Union submitted a new petition supported by a "fresh" 30 percent showing of interest, Linden

[4] See Section 101.18(a) of the Board's Statements of Procedure, 29 C.F.R. 101.18(a); *National Labor Relations Board* v. *Air Control Prods. of St. Petersburg, Inc.*, 335 F. 2d 245, 250–251 (C.A. 5).

Pro-union conduct by a supervisor during an organizational campaign may, however, be grounds for setting aside a representation election or provide a defense to a refusal-to-bargain charge. *Air Control Prods., supra*, 335 F. 2d at 250. Here, the trial examiner ultimately found that Marsh was not a supervisor (Pet. App. C, p. 86), and that, while Shafer was a supervisor, "[t]here is no evidence * * * that he solicited employees or otherwise enlisted their support of the Union" (*id.* at 117).

would enter into a consent election agreement. Smedstad replied that the Union already had "all the people lined up." Rector repeated that, since supervisors had solicited these people, without a fresh showing of interest no consent election could be agreed upon and no bargaining would take place (Pet. App. C, pp. 56–57; A. 38–39.)

The next day, February 4, Union representative Norman met with the employees and informed them of what had occurred at the prehearing conference. Nine employees then signed a statement distributed by Norman reaffirming their desire to be represented by the Union. Both Marsh and Shafer attended the meeting but neither signed the statement (Pet. App. C, p. 57; A. 17–19, 49). On February 6, Norman presented the statement, together with another request for recognition, to Linden's general manager, who referred the matter to Rector (Pet. App. C, p. 57; A. 19–20, 50). On February 8, Rector wrote to the Union denying its renewed request for recognition because "your membership includes supervisors * * * who influenced and dominated employees of the proposed unit." The letter added that the Union had the opportunity to prove its claim before the Board, but had withdrawn its representation petition. (Pet. App. C, p. 57; A. 20–21, 51.)

The Union filed no new petition for an election. Instead, on February 15, all but one of the employees who signed the reaffirmation statement struck in support of the Union's demand for recognition and picketed the Company's premises (Pet. App. C, p. 57;

A. 23–24). On February 23, the Union filed a refusal-to-bargain charge with the Board. The strike terminated on June 1 (Pet. App. C, p. 57).

The Board (Members Brown and Fanning dissenting) held that, absent independent unfair labor practices which would preclude a fair election, an employer "should not be found guilty of a violation of Section 8(a)(5) [of the Act] solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election," and accordingly dismissed the complaint insofar as it alleged that the Company had unlawfully refused to bargain with the Union (Pet. App. C, pp. 63–64).[5] The Board noted that the Company had never agreed to any voluntary means for resolving the Union's claim of majority status other than a Board election (*ibid.*). The Board also rejected the Union's contention that, because the picket line showing gave the Company "independent knowledge" that the Union possessed majority support and the Company made no effort to secure a Board election to resolve any doubt it may have had, a finding of violation of Section 8(a)(5) was warranted. The Board concluded that consideration of these factors would require it to reenter the "thicket" of assessment of the employer's "good-faith," an inquiry "which we announced to the Supreme Court in [*National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575] * * * we had 'virtually abandoned * * * altogether'" (Pet. App. C, p. 63).

[5] The Board found, however, that the Company had violated Section 8(a)(3) of the Act by failing to reinstate two of the strikers. But the Board further found that, since these unfair labor practices occurred well after the start of the organizing campaign and under circumstances which would not lead other employees to view them as retribution for such activity, they did not preclude the conduct of a fair election (Pet. App. C, pp. 58–59).

2. WILDER

On October 12, 1965, representatives of the Textile Workers Union visited the plant of the Wilder Manufacturing Co. ("Wilder"), a manufacturer of cooking utensils. They presented the Company with eleven signed and two unsigned authorization cards,[6] stated that they represented a majority of Wilder's production and maintenance employees, and requested recognition.[7] Wilder official Walter Derse commented that some were unsigned. Union representative Cohen stated that two unsigned cards were included because the employees involved had indicated that they wanted to sign but the Union had not yet obtained their signatures. Cohen again requested recognition, but Derse replied that he had no authority to make that decision and that it could not be made until his brother, vice president Arthur F. Derse, Jr., returned to town (Pet. App. D, p. 120; A. 144–147, 160–162).

[6] The card was an application for membership in the Union and designated the Union as the employee's representative for purposes of collective bargaining (Pet. App. D, p. 128, n. 7; A. 187).

[7] There were 30 employees at Wilder's plant, eighteen of whom were included in the production and maintenance unit ultimately found appropriate by the trial examiner. The examiner rejected the Company's contention that seven technical employees also should be included in the unit (Pet. App. D, pp. 130–140).

Shortly after Cohen left, the eleven employees who had signed authorization cards left the plant and established a picket line[8] (Pet. App. D, p. 121). The next day Cohen telephoned Walter Derse, repeated his request for recognition, and stated that he had obtained employee signatures on additional authorization cards.[9] Derse reiterated that he could not answer the request until after he met with the other officers later that evening (*id.* at 143–144, n. 34; A. 153–154, 165).

Wilder's officers met during the evening of October 13. Walter Derse stated that only ten or eleven employees were on strike, adding that, since there were 30 employees at the plant, the Union could not possibly represent a majority. The officers decided not to recognize the Union (Pet. App. D, p. 121; A. 166–167). When the Union's further requests for recognition were denied, it filed unfair labor practices charges with the Board (Pet. App. D, p. 121).

The Board (Member Fanning dissenting), relying on its decision in *Linden*,[10] dismissed the complaint

[8] The picketing continued for approximately five months (Pet. App. D, p. 146).

[9] Two more employees signed cards that day and one of them joined the picket line (Pet. App. D, p. 129).

[10] In its initial decision in *Wilder*, issued prior to *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, the Board dismissed the complaint on the ground that there was no evidence that the Company's refusal to bargain had been in bad faith (Pet. App. D, p. 122). The court of appeals remanded the case to the Board for reconsideration in light of *Gissel* (Pet. App. E, pp. 160–164). In its first supplemental decision, the Board found an unlawful refusal to bargain on the ground that the Company knew that the Union possessed

(Pet. App. G, pp. 178–193).[11] It reiterated that, "absent employer unfair labor practices, the objectives of our statute are best served by encouraging the parties to utilize our orderly election procedures to establish a reliable majority-support foundation for a bargaining relationship" (*id.* at 182; emphasis omitted).

B. THE DECISION OF THE COURT OF APPEALS

The court of appeals reversed the Board's rulings that, by requiring that the unions establish their majority status in an election, the employers had not unlawfully refused to bargain. It held that, "[w]hile * * * cards alone, or recognitional strikes and ambiguous utterances of the employer, do not necessarily provide such 'convincing evidence of majority support' so as to require a bargaining order, they certainly create a sufficient probability of majority support as to require an employer asserting a doubt of majority status to resolve the possibility through a petition for an election, if he is to avoid both any duty to bargain and any inquiry into the actuality of his doubt" (Pet. App. A, p. 47). The court remanded the

majority support and had no "genuine willingness * * * to resolve any lingering doubts * * * [through] the Board's election procedures" (Pet. App. F, pp. 169–170). After its decision in *Linden*, the Board issued a second supplemental decision in *Wilder*, reversing its earlier finding of an unlawful refusal to bargain (Pet. App. G, pp. 178–193).

[11] The complaint alleged a refusal to bargain, in violation of Section 8(a)(5) of the Act, and also alleged restraint and coercion, in violation of Section 8(a)(1). The Board's dismissal of the latter allegations (Pet. App. D, pp. 119, 125–128) is not in issue here.

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cases to the Board "to reconsider what option, consistent with the statute, it wishes to follow" (*id.* at 50).[12]

SUMMARY OF ARGUMENT

Under the doctrine of *Joy Silk Mills, Inc.*, 85 NLRB 1263, enforced, 185 F. 2d 732 (C.A.D.C.), certiorari denied, 341 U.S. 914, which the Board followed for many years, an employer could lawfully refuse to bargain with a union that claimed representative status on the basis of either authorization cards or some other means less reliable than a Board election, if he had a "good faith doubt" whether the union represented a majority of the employees in an appropriate unit. In *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, this Court sustained the Board's abandonment of the good faith doubt test in situations where the employer has committed serious unfair labor practices that impeded the election process. In the present cases, the Board has also abolished that test in situations where the employer has not interfered with the election process.

An employer may have many valid objections to recognizing a union on the basis of cards. An inquiry into his subjective motivation for refusing recognition is not likely to yield a reliable answer. Similar difficulties are encountered in attempting to ascertain whether the employer had knowledge "independently" of the cards that would confirm the union's majority status. As the court of appeals acknowledged, the fact that a majority of the employees strike and picket does not necessarily establish that they desire the union as their representative. For these reasons, the Board properly concluded that it should no longer inquire into an employer's good faith doubt of majority status, but should adopt a clear-cut rule; *i.e.*, if he has not prejudiced the conduct of a fair election by unfair labor practices and has not agreed to be bound by a voluntary method of determining the union's representative status, an employer does not violate Section 8(a)(5) of the Act merely by insisting that the union verify its majority in a Board election.

The Board's position harmonizes Section 8(a)(5) with the other provisions of the Act and effectuates its policies. In *Gissel*, this Court acknowledged the superiority of the election process and recognized that it is the preferred method of determining majority status. The Board's position encourages resolution of representation cases by this salutary means.

The issuance of bargaining orders based on card or picket line indications of majority support would tend to encourage picketing for recognition, contrary to the congressional objective reflected in Section 8(b)(7)(C) of the Act. This provision seeks to encourage

[12] The court indicated that (Pet. App. A, p. 47, n. 47):

> The Board might, in order to reduce litigation and delay in these matters, adopt the rule that an employer must, when presented with an authorization card majority, either recognize the union or, within a reasonable time, petition for a certification election. * * * Without such a *per se* rule, * * * the Board would have to use some version of the "independent knowledge" test [discussed *infra*, pp. 19, 21] it considers workable, in order to define those conditions where a failure of an employer to petition for an election would be a predicate for an 8(a)(5) bargaining order.

resort to the Board's election machinery, and correspondingly to limit resort to the coercive pressures of picketing, as the method for resolving questions of representation. Similarly, the Board's position encourages use of its election machinery to determine representation questions.

Finally, the Board's position is consistent with this Court's recognition in *Gissel* that there was a "category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not support a bargaining order." 395 U.S. at 615. If a bargaining order based on cards is not warranted even in some cases where the employer has committed independent unfair labor practices, it would be anomalous to hold that an order is nonetheless required where the employer has committed no unfair labor practices.

In directing the Board to adopt some version of the unworkable good faith or independent knowledge tests, and in suggesting that it promulgate a *per se* rule requiring the employer to file a petition for an election in every case in which he is confronted with a card or picket line showing of majority, the court of appeals impermissibly intruded upon "the Board's special function of applying the general provisions of the Act to the complexities of industrial life." *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 236. Neither the language of the Act nor its legislative history reflects any congressional intention to impose a requirement that the employer file a petition for an election in order to avoid violation of

Section 8(a)(5). Moreover, contrary to the view of the court of appeals, to require the employer to petition for an election will not preclude litigation of significant differences between the parties, or prevent an employer from delaying resolution of the representation question, if he so desires.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT AN EMPLOYER WHO HAS NEITHER PREJUDICED THE HOLDING OF A FAIR ELECTION NOR AGREED TO A VOLUNTARY METHOD OF DETERMINING THE UNION'S MAJORITY STATUS NEED NOT BARGAIN WITH THE UNION UNTIL IT HAS VERIFIED ITS CARD OR PICKET LINE SHOWING OF EMPLOYEE SUPPORT IN A BOARD ELECTION

In *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, the Court sustained the Board's authority to require an employer to recognize and bargain with a union that based its claim to representative status solely on the possession of union authorization cards, where the employer had engaged in independent unfair labor practices that tended to preclude the holding of a fair election. The Court found it unnecessary to decide whether a bargaining order based on cards or some other showing of employee support other than certification in a Board election "is ever appropriate in cases where there is no interference with the election processes." *Id.* at 595; see also *id.* at 601, n. 18. That question is presented here.

The Board concluded on the basis of its past experience that, irrespective of whether he establishes a "good faith doubt" about the union's majority status,

an employer who has neither prejudiced the holding of a fair election by unfair labor practices nor agreed to a voluntary method of determining the union's majority status should not be obliged to bargain with a union until it has verified its card or picket line indication of employee support in a Board election. We show below that this conclusion constitutes a reasonable and proper interpretation of the statute.

1. Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Section 9(a) provides, in pertinent part, that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit * * *." Section 9(c)(1) permits the employees, the union, or the employer to petition the Board for an election by a secret ballot to determine whether any individual or labor organization is the majority representative of a particular group of employees.

While a Board election is not the only means by which a union may establish its representative status (*Gissel, supra,* 395 U.S. at 596–597), under the *Joy Silk* doctrine,[13] which the Board followed for many years, an employer could lawfully refuse to bargain with a union claiming representative status on the basis of authorization cards, or some means other than a Board election, if he had a "good faith doubt"

[13] *Joy Silk Mills, Inc.*, 85 NLRB 1263, enforced, 185 F. 2d 732 (C.A.D.C.), certiorari denied, 341 U.S. 914.

whether the union represented a majority of the employees in an appropriate unit. A good faith doubt would ordinarily be imputed to the employer if he insisted that the union verify its majority claim in a Board election, and refrained from committing independent unfair labor practices that tended to undermine the union.[14] On the other hand, the Board would find a lack of good faith doubt and would enter a bargaining order where the employer had committed such unfair labor practices, or had rejected without any reason the union's recognition demand.[15]

The good faith doubt test was frequently criticized,[16] however, and the Board experienced considerable dif-

[14] See *Abinante & Nola Packing Co.*, 26 NLRB 1288, 1322–1323; *Roanoke Public Warehouse*, 72 NLRB 1281, 1282–1283; *Artcraft Hosiery Co.*, 78 NLRB 333, 334; *A. L. Gilbert Co.*, 110 NLRB 2067, 2069–2070.

The considerations prompting this conclusion were that the determination whether the union represents a majority of the employees in an appropriate unit frequently presents complex factual and legal issues; the election procedures of the Act provide a quick and dependable means of resolving those issues (see pp. 23–24, *infra*); and the employer would commit an independent violation of the Act if he recognized a minority union. See *Garment Workers' Union* v. *National Labor Relations Board*, 366 U.S. 731.

[15] *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 868 (C.A. 2), certiorari denied, 304 U.S. 576; *Acme-Evans Co.*, 24 NLRB 71, 113–114, enforced, 130 F. 2d 477 (C.A. 7); *Trimfit of Cal., Inc.*, 101 NLRB 706, 708, enforced, 211 F. 2d 206 (C.A. 9); *Pyne Moulding Corp.*, 110 NLRB 1700, 1707–1708, enforced, 226 F. 2d 818 (C.A. 2); *Economy Food Center, Inc.*, 142 NLRB 901, 913–914, enforced, 333 F. 2d 468 (C.A. 7).

[16] One of the criticisms was that an employer's unfair labor practices did not necessarily show that he did not have a good faith doubt of majority, in that "[t]he fact of employer coer-

ficulty in its practical application. Accordingly, in *Aaron Brothers Co.*, 158 NLRB 1077, the Board announced that an employer "will not be held to have violated his bargaining obligation under the law simply because he refuses to rely upon cards, rather than an election, as the method for determining the union's majority." *Id.* at 1078. The Board added that it was the General Counsel who had to establish affirmatively the existence of bad faith on the part of the employer. *Id.* at 1079. Thus, the employer no longer had to present reasons for rejecting a bargaining demand and he would not be deemed to have acted in bad faith merely because he insisted on an election. Furthermore, the Board noted that not every unfair labor practice would result in a finding of bad faith and the issuance of a bargaining order.[17]

The Board stated during the oral argument in *Gissel*, that by then it "had virtually abandoned the *Joy Silk* doctrine altogether." 395 U.S. at 594. The Court observed in *Gissel* (*ibid.*):

> Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election. Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple "no comment" to the union.[18]

This principle was qualified by the "independent knowledge" exception, *i.e.*, "an employer could not refuse to bargain if he *knew*, through a personal poll for instance, that a majority of his employees supported the union." *Ibid.* (emphasis in original); see *Snow & Sons*, 134 NLRB 709, enforced, 308 F. 2d 687 (C.A. 9).[19]

In *Gissel*, this Court accepted the Board's abandonment of the good faith doubt test in situations where the employer committed serious unfair labor practices that impeded the election process. In the present cases, we submit, the Board has also properly

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cion may be as consistent with a desire to prevent the acquisition of majority status as with a purpose to destroy an existing majority." Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851, 855 (1967). The test was also criticized for being unworkable, necessitating inquiry into the employer's state of mind. See *National Labor Relations Board* v. *River Togs, Inc.*, 382 F. 2d 198, 206–208 (C.A. 2); Christensen & Christensen, *Gissel Packing and "Good Faith Doubt": The Gestalt of Required Recognition of Unions under the N.L.R.A.*, 37 U. Chi. L. Rev. 411 (1970); Comment, *Employer "Good Faith Doubt,"* 116 U. Pa. L. Rev. 709 (1968).

[17] See *Hammond & Irving, Inc.*, 154 NLRB 1071; *Clermont's Inc.*, 154 NLRB 1397; *Hercules Packing Corp.*, 163 NLRB 264, enforced, 386 F. 2d 790 (C.A. 2).

[18] The Court also noted that "by no longer requiring an employer to show affirmative reasons for insisting on an election * * *," the Board had eliminated some First Amendment "problem areas." 395 U.S. at 617.

[19] In *Snow*, the employer, upon being presented with an apparent card majority, agreed to submit the cards to an impartial third party for authentication, but, after authentication, still refused recognition, claiming that he never considered the agreement binding.

ended reliance upon such subjective tests in situations where the employer has refrained from interfering with the election process.

2. An employer may have many valid objections to recognizing a union on the basis of cards.[20] An inquiry into whether an employer has declined card-based recognition because he does not trust cards or because he opposes unions is unlikely to yield a reliable answer,[21] for "[n]either the Board nor the courts can read the minds of men." *Joy Silk Mills, Inc.* v. *National Labor Relations Board,* 185 F. 2d 732, 742 (C.A.D.C.), certiorari denied, 341 U.S. 914.

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[20] The employer may believe that cards "cannot accurately reflect an employee's wishes, either because [he] * * * has not had a chance to present his views and thus a chance to insure that the employee choice was an informed one, or because the choice was the result of group pressures and not individual decision made in the privacy of a voting booth"; moreover, "cards are too often obtained through misrepresentation and coercion * * *." *Gissel, supra,* 395 U.S. at 602. See also Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act,* 78 Harv. L. Rev. 38, 122 (1964); Comment, *Refusal-to-Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice,* 33 U. Chi. L. Rev. 387, 389–392 (1966); Comment, *Union Authorization Cards,* 75 Yale L.J. 805, 823–831 (1966); *Gissel, supra,* 395 U.S. at 602, n. 19.

[21] For example, under the *Joy Silk* approach, an employer opposed to unions could mask his true motive merely by stating that he believes the cards are unreliable, while an employer who rejected the union's request without comment could be found "guilty" of a refusal to bargain even though he had in fact been motivated by a distrust of the cards.

Similar difficulties are encountered in attempting to ascertain whether the employer has knowledge "independently" of the cards that would confirm the union's majority status. As the court of appeals recognized, for example, the fact that a majority of the employees strike and picket does not necessarily establish that they desire the union as their representative.[22] Further probing of this question would require the Board to enter the "tangled thicket" (Pet. App. G, p. 182) of subjective motivation, which, as this Court observed in *Gissel,* involves "an endless and unreliable inquiry." 395 U.S. at 608.[23] Accordingly, as the Board here stated (Pet. App. C, p. 63):

> Unless, as in *Snow & Sons* [see p. 19, *supra,* n. 19], the employer has agreed to let its "knowledge" of majority status be established through a means other than a Board election, how are we to evaluate whether it "knows" or whether it "doubts" majority status? * * *

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[22] "Refusal to cross a picket line may reflect mere fear * * * [o]r it may reflect a respect for what the individual supposes is the will of the majority even though he (and in fact a majority) does not wish the union to act as a bargaining representative" (Pet. App. A, p. 44, n. 44). See *National Labor Relations Board* v. *Union Carbide Corp.,* 440 F. 2d 54, 56 (C.A. 4), certiorari denied, 404 U.S. 826.

See also A. 129–131, 133–136, 140–141, 159–160, 168–169, 170–173; O'Connor, *Respecting Picket Lines; A Union View,* N.Y.U. 7th Conf. on Lab. 235, 257–258 (1954); Carney & Florsheim, *The Treatment of Refusals to Cross Picket Lines: "By-Paths and Indirect Crookt Ways,"* 55 Corn. L. Rev. 940, 940–941 (1970); cf. *New York Tel. Co.,* 89 NLRB 383.

[23] See Comment, *Employer Recognition of Unions on the Basis of Authorization Cards: The "Independent Knowledge" Standard,* 39 U. Chi. L. Rev. 314, 319–325 (1972).

For these reasons, the Board was warranted in concluding that it should no longer inquire whether an employer was motivated by a good faith doubt in rejecting a union's card or picket line indication of majority support,[24] and in adopting, instead, the clear-cut principle that an employer does not violate Section 8(a)(5) of the Act merely by insisting that the union verify its majority in a Board election, if he has neither prejudiced the conduct of a fair election by unfair labor practices nor agreed to be bound by a voluntary method of determining the union's representative status.[25]

[24] The court below correctly noted that the court decisions indicating that a strike supported by a majority of the employees in a unit undermines a good faith doubt of majority are distinguishable. See *National Labor Relations Board* v. *Harris-Woodson Co.*, 179 F. 2d 720 (C.A. 4) (recognitional strike in the context of a refusal to negotiate with a union already certified after a Board election); *National Labor Relations Board* v. *National Seal Corp.*, 127 F. 2d 776 (C.A. 2) (recognitional strike accompanied by independent unfair labor practices and anti-union animus of officers of predecessor corporation who were still in control). "There is no case holding that the statute requires the Board to use recognitional strikes as conclusive evidence" of majority support (Pet. App. A. p. 43). See also *National Labor Relations Board* v. *World Carpets of N.Y., Inc.*, 463 F. 2d 57, 61, n. 4 (C.A. 2).

[25] In order to encourage the parties to adhere to their voluntary agreements, the Board will continue to find a refusal to bargain in the situation presented in *Snow & Sons*, *supra* (see p. 19, *supra*, n. 19). That is, if an employer agrees to have majority status determined by a means other than a Board election, he may not disclaim that determination, and insist on a Board election, simply because he disagrees with the results of that determination (Pet. App. C, pp. 64–65). *Nation-Wide Plastics Co.*, 197 NLRB No. 136, 81 LRRM 1036; *Sullivan Elec. Co.*, 199 NLRB No. 97, 81 LRRM 1313, enforced, 479 F. 2d 1270 (C.A. 6); *Atlantic Tech. Servs. Corp.*, 202 NLRB No. 13, 82 LRRM 1467, enforced, 86 LRRM 2182 (C.A.D.C.).

3. This position harmonizes Section 8(a)(5) with the other provisions of the Act and effectuates its policies. In *Gissel*, the Court recognized the superiority of the election process: "[S]ecret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." 395 U.S. at 602. The Board, too, has consistently maintained that its election procedures provide a better means of testing majority support than does a check of authorization cards. As the Board stated in *Aaron Brothers Co., supra,* 158 NLRB at 1079, n. 10, its objective has always been the utilization of

> the most reliable means available to ascertain the true desires of employees with respect to the selection of a collective bargaining representative. Where an employer has engaged in unfair labor practices, the results of a Board-conducted election are a less reliable indication of the true desires of employees than authorization cards, whereas in a situation free of such unlawful interference the converse is true.

As noted above (p. 16, *supra*) Section 9(c)(1) of the Act permits either the union or the employer to petition for an election, and, where no interference has occurred, an election can be held expeditiously.[26] The Board's present position encourages the resolution of representation questions by this salutary

[26] In contested representation cases, the median time between the filing of the petition and the decision of the regional director directing an election is about 45 days. *Thirty-Eighth Annual Report of the National Labor Relations Board* 13 (1973).

means.[27] On the other hand, where a fair election could be held, issuance of bargaining orders based on a card or picket line indication of majority support is likely to delay resolution of the representation question for a considerable period of time. Unfair labor practice proceedings, particularly where the validity of each card is contested, are generally far more protracted than representation proceedings.[28]

Moreover, the issuance of such bargaining orders would tend to encourage picketing for recognition, contrary to the congressional objective reflected in the restriction of such picketing in Section 8(b)(7)

[27] An election provides an opportunity for the employer to exercise his protected right (under Section 8(c) of the Act, 29 U.S.C. 158(c), and the First Amendment) to influence the vote of his employees through non-coercive speech. See *Gissel*, *supra*, 395 U.S. at 616–619; *Thomas* v. *Collins*, 323 U.S. 516, 537–538; *National Labor Relations Board* v. *Virginia Elec. & Power Co.*, 314 U.S. 469; Pet. App. A, p. 39, n. 32. "[A]n employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice." *Excelsior Underwear Inc.*, 156 NLRB 1236, 1240. Moreover, "an election is a solemn * * * occasion, conducted under safeguards to voluntary choice * * *. A petition or a public meeting—in which those voting for and against unionism are disclosed to management, and in which the influences of mass psychology are present—is not comparable to the privacy and independence of the voting booth." *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 99–100.

[28] The Board's records show that in fiscal 1973 the median time between the filing of an unfair labor practice charge and a Board decision in a contested case was 356 days, Cf. *Gissel*, *supra*, 395 U.S. at 611, n. 30. In *Linden*, the time between the filing of the charge and the Board's decision was about four and one-half years (A. 1–2), and in *Wilder* it was about six and one-half years (A. 55–56).

(C), 29 U.S.C. 158(b)(7)(C). This section effectuates the federal policy of ensuring employees free choice in the selection or rejection of a bargaining representative (see *National Labor Relations Board* v. *Local 542, Operating Engineers*, 331 F. 2d 99, 107 (C.A. 3), certiorari denied, 379 U.S. 889) by encouraging prompt use of the Board's election machinery, and, consequently, limiting resort to the coercive pressures of picketing, as the method for resolving questions of representation. See *Department & Specialty Store Employees' Union, Local 1265* v. *Brown*, 284 F. 2d 619, 626 (C.A. 9), certiorari denied, 366 U.S. 934; *Dayton Typographical Union No. 57* v. *National Labor Relations Board*, 326 F. 2d 634, 646 (C.A.D.C.). The Board's position in the instant cases similarly encourages use of the Board's election machinery to determine representation questions, and seeks to avoid the need to determine them in the context of ongoing industrial strife.[29]

[29] Contrary to the Unions' contention (Br. in Opp., pp. 5–7), the Board's position does not ignore Congress' rejection, in 1947, of an amendment that would have permitted "the Board to find a refusal-to-bargain violation only where an employer had failed to bargain with a union 'currently recognized by the employer or certified as such [through an election] under section 9.'" *Gissel*, *supra*, 395 U.S. at 598. Where the employer has engaged in conduct which precludes the holding of a fair election or where he reneges on an agreement to have the union's status determined by another method (p. 22, *supra*, n. 25), the Board will find a bargaining obligation based on a showing of majority status other than through a Board election.

Indeed, the Unions concede (Br. in Opp., pp. 8–9, n. 3) that Congress did not answer the question whether employers have a duty to recognize a union which presents "authorization cards

4. In *Gissel,* while sustaining the Board's authority to issue a bargaining order where the union had shown majority status through cards and the employer had engaged in independent unfair labor practices which precluded a fair election, the Court recognized that there was a "category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order." 395 U.S. at 615. If a bargaining order based on cards is not warranted even in some cases where the employer has committed independent unfair labor practices, it would be anomalous to hold that one is nonetheless required where the employer has committed no unfair labor practices.[30] The Board's present interpretation of Section 8(a)(5) avoids this anomaly.[31]

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backed by recognitional strikes by the card signers," and they add that this "question is intensely practical and has not been dealt with in terms by Congress" (*id.* at 8–9). Accordingly, the area is one "[w]here Congress has in the statute given the Board a question to answer, [and] the courts will give respect to that answer * * *." *National Labor Relations Board* v. *Insurance Agents' Union*, 361 U.S. 477, 499.

[30] Indeed, in *Linden*, the employer committed an independent unfair labor practice which the Board found was insufficient to warrant a bargaining order under the *Gissel* standards (p. 8, *supra*, n. 5). Yet, under the decision of the court of appeals, a bargaining order might nonetheless be required.

[31] It is also consistent with the Court's answer in *Gissel* to the employers' contention that predicating a bargaining order on cards gives them a Hobson's choice. The employers contended that, "if they do not make an immediate, personal investigation into possible solicitation irregularities * * *, they will have unlawfully refused to bargain for failure to have a good faith doubt of the union's majority; and if they do make such an investigation, their efforts at polling and interrogation will constitute an unfair labor practice in violation of § 8(a)(1) and they will again be ordered to bargain." 395 U.S. at 609. The Court responded: "As we have pointed out, however, an employer is not obligated to accept a card check as proof of majority status, under the Board's current practice, and he is not required to justify his insistence on an election by making his own investigation of employee sentiment and showing affirmative reasons for doubting the majority status [citing *Aaron Brothers Co., supra*]* **." *Ibid.* See also *id.* at 600; "[W]e agree that the policies reflected in § 9(c)(1)(B) [pp. 3–4, *supra*] fully support the Board's present administration of the Act * * *; for an employer can insist on a secret ballot election, unless, in the words of the Board, he engages 'in contemporaneous unfair labor practices likely to destroy the union's majority and seriously impede the election.'"

5. The court of appeals recognized that "[i]t is certainly permissible for the Board to avoid encouraging recognitional striking and picketing by refusing to regard them as an independent and conclusive method of demonstrating a majority * * *" (Pet. App. A, p. 44), and that, because of the "difficulties in determining the state of past employer knowledge * * *" (*id.* at 45), it is "conceivable that a restriction of 'independent knowledge' to an agreement to abide by an authentication would be acceptable * * *" (*id.* at 47). The court concluded, however, that the Board could not so restrict the "independent knowledge" test without substituting the requirement that the employer "evidence his good faith doubt as to majority status * * * by petitioning for an election" (*id.* at 47) or by voicing "consent to abide by an election ordered on union petition" (*id.* at 46, n. 46). The court's reasons for this conclusion do not withstand analysis.

First, noting that Congress in 1947 authorized employers to file their own representation petitions (Section 9(c)(1)(B), pp. 3–4, 16, *supra*), the court inferred that the premise of this provision was that "employers could 'test out their doubts as to a union's majority status' by petitioning for an election" (Pet. App. A, p. 47). The legislative history of Section 9(c)(1)(B) shows, however, that this provision was intended merely to eliminate the "discrimination" against employers which had existed under the prior Board rules, which permitted a union to petition for an election even though it alone was seeking recognition but permitted an employer to do so only when confronted with claims by two or more unions.[32] There is no indication that this provision was intended to go further and require an employer who had doubts as to a union's majority status to petition for an election, in order to avoid a refusal-to-bargain finding.

Second, the court asserted that, "[w]hen an employer petitions for or consents to [an] election, the election process is expedited" (Pet. App. A, p. 48), since the employer "would be required to define the appropriate unit and therefore would not be entitled, as an objecting party, to request a hearing" or to "object to a sufficient (30%) showing of majority support" (Pet. App. A, p. 48, n. 48). But, as there may be more than one appropriate unit for bargaining purposes, the employer and the union may have legitimate differences of opinion over the unit in which an election should be held.

[32] See S. Rep. No. 105, 80th Cong., 1st Sess., Part 1, pp. 10–11; 93 Cong. Rec. 3838.

For example, the union may have requested recognition in a small unit, whereas the employer may prefer a larger, but still appropriate, unit. Should the employer be forced to file a petition, he would doubtless pick the larger unit. It is unlikely that the union would accept that unit, in which case, the employer's petition would be dismissed.[33] Accordingly, the union, if it desired an election in the smaller unit, would still have to file its own petition, and the employer would remain free to contest the appropriateness of the unit sought by the union. Moreover, even if the disparity between the units sought by the employer and the union was not sufficient to require dismissal of the employer petition, the time saving envisioned by the court of appeals would occur only if the union were willing to resolve in the employer's favor all questions concerning whether or not particular individuals or jobs fell within the unit.[34]

[33] Section 9(c)(1)(B) of the Act states that an employer petition must allege that "one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a)." Since the "question of representation * * * is raised only by an affirmative claim of a labor organization that it represents a majority of employees in an appropriate unit," the Board will dismiss the employer's petition if there is a significant discrepancy between the unit set forth therein and the unit for which the union has requested recognition. *Amperex Electronic Corp.*, 109 NLRB 353, 354. Accord, *Wm. Wood Bakery, Inc.*, 97 NLRB 122; *Bowman Bldg. Prods. Div.* 170 NLRB; *Aerojet-General Corp.*, 185 NLRB 794.

[34] For example, in *Wilder*, the employer contended that seven technical employees should be included in the unit (p. 9, *supra*, n. 7). It is unlikely that the Union, without a contest, would have accepted those seven employees, for they could have spelled the difference between victory and defeat.

Thus, contrary to the view of the court of appeals, to require the employer to petition for a Board election would not preclude litigation of significant differences between the parties, nor prevent an employer who sought to delay resolution of the representation question from drawing his petition so as to elicit objections from the union.[35] Moreover, if Congress had intended to impose the requirement that the employer must file a petition for an election in order to avoid violation of Section 8(a)(5), it seems reasonable to suppose that it would have said so. Neither the language of the Act nor its history reflects any such intention.

In sum, the Board properly concluded that an employer who, like Linden and Wilder here, has not impeded the conduct of a fair election and has not agreed to a voluntary method of resolving the union's majority status does not violate Section 8(a)(5) of the Act merely by insisting that the union verify its majority in a Board election. The Board's position "encourage[s] the principle of voluntarism but at the same time insure[s] that when voluntarism fails the 'preferred route' of secret ballot elections is available

[35] The court erred in suggesting that an employer petition would obviate litigation over the sufficiency of the union's showing of interest. While a union petition, unlike an employer petition, must be backed by a 30 percent showing of employee interest (p. 6, *supra*, n. 4), the sufficiency of such a showing is not litigable by the parties. *National Labor Relations Board* v. *Savair Mfg. Co.*, 414 U.S. 270, 287, n. 6 (White, J., dissenting).

to those who do not find any alternative route acceptable" (Pet. App. C, p. 64). The Board is entrusted with primary responsibility for balancing the conflicting rights and obligations of the parties under the statute,[36] and the accommodation it made here is reasonable. In directing the Board either to adopt a *per se* rule requiring the employer to file a petition for an election in every case in which he is confronted with a card or picket line showing of majority, or to apply some version of the concededly unworkable good faith or independent knowledge tests (p. 12, *supra*, n. 12), the court of appeals impermissibly intruded upon "the Board's special function of applying the general provisions of the Act to the complexities of industrial life." *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 236.

[36] "The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *National Labor Relations Board* v. *Truck Drivers Union*, 353 U.S. 87, 96.

CONCLUSION

The judgment of the court of appeals should be reversed and the cases should be remanded to that court with directions to affirm the Board's orders dismissing the refusal to bargain allegations of the complaints.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
PETER M. BERNSTEIN,
Attorney,
National Labor Relations Board.

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